of husband and wife, may, after receiving their respective portions and in default of other legitimate inheritors, demand that the remainder of the estate should be proportionately distributed amongst them. The state is even excluded by cognates, if the deceased has left no legitimate heir. By "cognates" are understood all relatives, except those already mentioned as legitimate heirs. They are of ten different kinds of relationship: (1) mother's father and, in general, any ancestor or ancestors who is not a legitimate heir or heiress; (2) daughters' children; (3) any brothers' daughters; (4) sisters' children; (5) uterine brothers' sons; (6) father's uterine brother; (7) father's brother's daughters; (8) father's sisters; (9) mother's brothers and sisters; (10) relatives of all these persons, male and female."

It is clear from this passage that at the time the *Minhaj et Talibin* was written neither the husband nor the wife of a deceased person who belonged to the Shafi School of Law was entitled to succeed to the residue of his property by Return. Among the books on Muslim law prescribed by the Muslims Ordinance, the *Minhaj et Talibin* is the only one which contains a definite statement on the point under consideration. Moreover, there is nothing to indicate that since the time the *Minhaj et Talibin* was written the Shafi law on the point has been altered or modified. I accept the statement contained in the *Minhaj et Talibin* as proof of the Shafi law on the point and hold that the plaintiff is not entitled to succeed to the residue of the deceased's property.

It was contended by counsel for the plaintiff that as there was no *Bait-ul-Mal* in Singapore the plaintiff was entitled to the three-quarter share of the deceased's property in addition to her own one-quarter share. On this point it is relevant to refer to section 265 of *Wilson's Anglo-Muhammadan Law*, and, in particular, the commentary at page 296. Section 265 and the commentary read as follows:—

Escheat to Government.

265. In default of all the successors above mentioned, the whole property of a Muhammadan dying intestate would in a Muhammadan State go to the *Bait-ul-Mal.*

By pure Muhammadan Law (Sir. 3) it would lapse to a fund called in Arabic the *Bait-ul-Mal* applicable to purely Muhammadan purposes, such as war against the infidel, the building of mosques, or the sustentation of poor believers. But the British Courts have refused to recognise the existence of any such fund, and have decided in substance that property for which there is no other claimant must necessarily be applicable to the general purposes of the Government. The leading authority for this principle is a Hindu case, *Collector of Masulipatam* v. *Cavaly*,[4] 8 Moo. I.A., 498 (1880) at p. 525; but inasmuch as it was applied there in the teeth of an express maxim of Hindu Law to the effect that the king shall in no case take the property of a Brahman, it must be applicable a *fortiori* to the case of Muhammadans, whose law contains no such maxim, but on the contrary expressly declares that the deposit in the Public Treasury is not by way of inheritance (*Sharifiyah*, 9, 10). The words of the Privy Council in that case were as follows: "When it is made out clearly that by the law applicable to the last owner there is a total failure of heirs, then the claim to the land ceases (we apprehend) to be subject to any such personal law; and as all property not dedicated to certain religious trusts must have some legal owner, and there can be, legally speaking, no unowned property, the law of escheat intervenes and prevails, and is adopted generally in all Courts of the country alike. Private ownership not existing, the State must be owner as ultimate lord."

The question who is entitled to succeed to the property of a deceased Muslim in the event of a total failure of heirs has also been considered in *Re Timah binti Abdullah deceased*,[5] In that case the deceased was a Japanese woman who had been converted to the Muslim faith. She died leaving a mother and brother who were not Muslims. At the time of her death she was domiciled in the State of Pahang where there was no *Bait-ul-Mal*. It was held that the deceased's mother and brother, being non-Muslims, had no right to inherit her property and that the State of Pahang was entitled to succeed to the whole of the estate.

It is to be observed that the plaintiff in the present case is not the deceased's next of kin within the meaning of section 16 of the Civil Law Ordinance (Cap. 24). Having regard to that fact, and to the principle set out in *Wilson's* commentary and, in effect, applied in *Re Timah binti Abdullah deceased, supra*, the three-quarter share of the deceased's property must, in my opinion, be held to have accrued to the Crown.

The answer to the question raised in this application is, therefore, that the plaintiff is beneficially entitled to one-quarter share of the deceased's estate while the remaining three-quarter share thereof has accrued to the Crown.

I am indebted to counsel on both sides for the assistance which they have rendered to the court in this matter.

By consent, the plaintiff's costs of these proceedings are fixed at the sum of $2,000. Counsel for the defendant having indicated that he is not asking for any order as to costs, no order is made as to the defendant's costs.

Order accordingly.

Solicitors: *Mallal & Namazie.*

KANAPATHY v. REGINA

[A. Cr. J. (Buttrose J.) September 2, 1959]

[Singapore — Magistrate's Appeal No. 31 of 1959]

Evidence — Conduct and behaviour — Hearsay — Admissibility — Objection to — Accomplice — Evidence Ordinance (Cap. 4), s.158.

Criminal law — Public servant — Conduct with reference to complainant's property — Penal Code (Cap. 119), s.165.

In this case the appellant, an Inspector of Police, was charged under section 165 of the Penal Code with accepting $50 without consideration from one Hanifa against whom a charge of attempted rape was withdrawn. The appellant was convicted by the District Judge and sentenced to 18 months' imprisonment.

The prosecution evidence disclosed that the complainant, Hanifa, a glazier employed by the Public Works Department was arrested by the appellant on October 3, 1957 on a charge of attempted rape and taken to the Joo Chiat Police Station. The appellant after questioning the complainant took from him his watch, gold wrist band and glass cutter while another police officer took the remainder of his property before putting him in the lock-

up. On being released on bail the same evening, complainant informed one of his bailors, Gafor by name, that the appellant had taken from him his watch, wrist band and glass cutter. On October 8 the appellant who still retained possession of the articles asked complainant to give him the gold wrist band and if he did so the case against him could be fixed up. The complainant declined and the appellant then returned the articles to him. On November 1 the appellant renewed his request for the gold wrist band indicating to the complainant that he would make some arrangement concerning the case against the complainant. The appellant had in fact on that very day received instructions from the Deputy Public Prosecutor to have the charge against the complainant withdrawn. The complainant said he had pawned the band and the appellant thereupon substituted a demand for cash, the subject matter of the charge preferred against him. The complainant reported the matter to one Ramoo who advised him to report the matter to the Corrupt Practices Investigation Bureau which the complainant did. At the Corrupt Practices Investigation Bureau an officer named Ramakrishnan interviewed the complainant and thereafter at his suggestion co-operated in laying a trap to catch the appellant.

It was argued on appeal that hearsay evidence was wrongly admitted of statements which the complainant made to other witnesses in the absence of the appellant.

Held: (1) the evidence relating to the gold wrist band and the glass cutter was properly admitted as part of the *res gestae* and was material and relevant;

(2) complainant's statement to Gafor was admissible under section 158 of the Evidence Ordinance as it was made at or about the time when the events took place;

(3) the statements made to Ramoo and Ramakrishnan by the complainant were not made at or about the time when the events took place and were therefore inadmissible under section 158 of the Evidence Ordinance;

(4) the fact that the complainant saw Ramoo, had a conversation with him and as a result of that conversation was sent to make a report to the Corrupt Practices Investigation Bureau was admissible but not what was said. Similarly the fact that the complainant immediately went and saw Ramakrishnan at the Corrupt Practices Investigation Bureau and made an oral report to him was admissible but not what was said;

(5) there was evidence before the District Judge to support his findings and the appellate Court saw no reason for disturbing them.

[**Editorial Note:** The appeal was dismissed and the conviction and sentence was affirmed. A Petition for special leave to appeal against the decision of Buttrose J. came before the Privy Council on November 5, 1959 and was rejected. The Board which was presided over by Lord Denning, upheld the view taken by the District Judge (and supported in the High Court) that the evidence relating to the gold wrist band and the glass cutter was properly admitted as part of the *res gestae*. They were of the opinion, moreover, that it could in any case have been properly adduced in rebuttal of the defence set up that the petitioner had never requested any payment from Hanifa and had not sought any material advantage from his connection with him.

The various grounds which, in effect, challenged the District Judge's view as to the credibility of the witnesses (including the petitioner) at the trial were not and could hardly be regarded as being within the scope of the principle on which the Privy Council reviews the decisions of colonial Courts. Questions of credit are, of course, primarily the province of the trial Judge who has the best opportunity and material for determining what belief should be given to the testimony of the witnesses whom he sees and hears. In expressing the view that the petitioner had "lied throughout", the District Judge certainly used emphatic language but it can hardly be described as unjudicial for it was the Judge's duty to assess the credibility of the petitioner as a witness and to state the conclusion at which he arrived upon the matter. The Privy Council, remote as it is from the atmosphere of the trial and the personalities of those concerned in it, is in no position to reject or depart from the trial Judge's opinion as to what witnesses are to be believed or disbelieved and in what degree.

A further ground of the Petition which was held to have no substance was the issue of law raised in regard to the application of section 165 of the Penal Code to the facts of the case as found by the trial Judge. The section in its true construction makes it an offence for a public servant to accept a gift (whether palpable or disguised) from any person who is or has at any time been concerned in a proceeding with which the public servant has been connected. The petitioner was manifestly concerned with the withdrawal of the charge against Hanifa, for unless he had made the original charge there could have been no withdrawal. It was immaterial that the petitioner was not responsible for the actual withdrawal of the charge or that he did not make the application to withdraw it.

The Board accepted the view taken in the High Court that the evidence of Hanifa's complaints to Ramoo and Ramakrishnan was wrongly admitted. They applied, however, the familiar passage in the Judgment of Viscount Hailsham L.C. in *Attygale* v. *R.* [1936] A.C. 338 at p. 341 where he said: "it has been repeatedly stated in a series of authorities that their Lordships do not sit as a Court of Criminal Appeal; that the mere fact that there has been a mistake of law does not afford sufficient ground of itself for granting special leave to appeal. Lord Sumner in a well-known passage in the case of *Ibrahim* v. *R.*, [1914] A.C. 599 at p. 615 pointed out that misdirection as such, even irregularity as such will not suffice . . . There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law."

Lord Denning intimated further that the admissible evidence against the petitioner pointed irresistibly to his guilt. When one took into account the fact that the District Judge believed Hanifa, irrespectively of any corroboration or support to be found in the terms of his complaints there was nothing left to argue. Those who represented the petitioner on his trial and on appeal to the High Court took every possible point on his behalf and there was no miscarriage of justice of which the Privy Council could take cognisance.]

Cases referred to:—

(1) *Stirland* v. *Director of Public Prosecutions*, [1944] A.C. 315.

(2) *Tan Yook Suan* v. *R.*, [1954] M.L.J. 116.

MAGISTRATE'S APPEAL.

David Marshall for the appellant.

G. Tara Singh Sidhu (Crown Counsel) for the respondent.

Buttrose J.: In this case the appellant, an Inspector of Police, was charged under section 165 of the Penal Code with accepting $50 without consideration from one Hanifa against whom a charge of attempted rape was withdrawn.

The appellant was convicted and sentenced to 18 months imprisonment. He now appeals.

There was ample evidence, if accepted by the learned District Judge, to support the conviction. He found that the complainant Hanifa was a truthful witness and he accepted his evidence. He did not believe the appellant and came to the conclusion that he had lied throughout. He described the appellant's defence as an ingenious attempt to explain away the evidence against him which raised no doubt in his mind as to the appellant's guilt.

Notwithstanding this, however, it was submitted that the learned District Judge had erred

in law in admitting certain evidence and misdirected himself on a number of matters.

The evidence as to the appellant's conduct with reference to the complainant's property was in my opinion admissible. The prosecution evidence disclosed that the complainant, Hanifa, a glazier employed by the Public Works Department was arrested by the appellant on the 3rd October 1957 on a charge of attempted rape and taken to the Joo Chiat Police Station. The appellant after questioning the complainant took from him his watch, gold wrist band and glass cutter and he was then detained in the lock-up. After leaving the appellant but before being put into the lock-up another police officer took possession of the remainder of the complainant's belongings such as his diary and measuring tape.

The complainant was released on bail the same evening and he informed one of his sureties, Gafor by name, that the appellant had taken his watch, wrist band and glass cutter.

Later the complainant made two or three abortive attempts to obtain the return of his property from the appellant who, at the outset had expressed a liking for and a desire to retain it.

On the 8th October the appellant who still retained possession of the articles asked the complainant to give him the gold wrist band and if he did so the case against him could be fixed up. The complainant declined and the appellant then returned the articles to him.

Subsequently on the 1st November the appellant, who had not apparently given up hope of obtaining the wrist band sent for the complainant and again asked him for the band indicating that he (the appellant) would make some arrangement concerning the case against the complainant. The appellant had in fact on that very day received instructions from the Deputy Public Prosecutor to have the charge against the complainant withdrawn. The complainant said he had pawned the band and the appellant thereupon substituted a demand for cash, the subject matter of the charge now preferred against him.

The whole of that evidence was, in my opinion, clearly part of the *res gestae* and was material and relevant. It is on an entirely different footing to evidence tending to show the previous bad character of an accused person which would have been inadmissible.

The evidence that the appellant's behaviour with regard to the complainant's property constituted a breach of Police General Orders was, in my opinion, inadmissible. While the relevant General Orders were not produced and secondary evidence as to their contents was wrongly admitted, section 440 of the Criminal Procedure Code I think covered the matter. The evidence, however, that the appellant's conduct did constitute a default of duty was inadmissible. While it is true that the learned District Judge referred briefly to this matter in his judgment I am quite satisfied that had the evidence been excluded he could not possibly have come to any other conclusion than the one which he did.

It was argued that hearsay evidence was wrongly admitted of statements which the complainant made to other witnesses in the absence of the appellant. Now this evidence to be admissible must come within section 158 of the Evidence Ordinance and such statements must be made either at or about the time when the fact to which they relate took place or before any authority legally competent to investigate.

The complainant's statement to Gafor was, in my view, admissible. The learned District Judge having heard the evidence found that the statement was made immediately after the complainant was released on bail. The only reasonable inference to be drawn from the evidence is that it was made at or about the time when the events took place.

The statements made to Ramoo and Ramakrishnan by the complainant were not made at or about the time when the events took place. They must therefore to be admissible be made before an authority legally competent to investigate which, of course, Ramoo clearly was not. In other words they must be made in the course of an investigation. They were not admissible under section 114 of the Criminal Procedure Code and they therefore fall within the prohibition of section 121 of the Criminal Procedure Code. The evidence of the statements made to Ramoo and Ramakrishnan were therefore inadmissible.

It remains to be considered whether these matters in themselves are such as to vitiate the conviction.

I think the fact that the complainant saw Ramoo, had a conversation with him and as a result of that conversation was sent to make a report to the Corrupt Practices Investigation Bureau was admissible but not what was said.

Similarly I think the fact that the complainant immediately went and saw Ramakrishnan at the Corrupt Practices Investigation Bureau and made an oral report to him was admissible but not what he said.

It is clear that the learned District Judge did not treat this evidence as corroboration but considered it merely as showing the consistency of the complainant's story and indeed Counsel for the appellant in the Court below in so far as the complainant's statement to Gafor was concerned agreed that it was relevant and admissible on that basis.

No objection was taken in the lower Court to the evidence of the statements made to Ramoo and Ramakrishnan by the complainant.

The principles to be applied where objection to the admissibility of evidence is not taken at the trial were enunciated by Viscount Simon L.C. in *Stirland* v. *Director of Public Prosecutions* [1] and it is unnecessary for me to re-state them.

After giving the matter very careful consideration I do not think the admission of the evidence in question in the circumstances of this case could have influenced the learned District Judge in coming to his decision.

Further the learned District Judge held that the complainant was not an accomplice. This is often a difficult question and it was discussed by Murray-Aynsley C.J. in *Tan Yook Suan* v. *Regina* [2]

In the present case the complainant reported the matter to the Corrupt Practices Investigation Bureau and thereafter at their suggestion cooperated with them in laying a trap to catch the appellant.

Prior to this the complainant was never at any time prepared to accede to the appellant's request to give him his wrist band and when the appellant substituted a demand for money he put him off until the case against him was over in the hope no doubt that the matter would not be raised again. When it was by the appellant sending a police patrol to fetch him to the Police Station two days after the case was in fact withdrawn he at once reported the matter to the Corrupt Practices Investigation Bureau. The complainant was not, in my opinion, an accomplice.

A number of other points were raised in argument directed mainly to the question of the learned District Judge having misdirected himself on a number of matters. There is, in my view, no substance in them. They depend to a very large extent on the evidence and on the view the learned District Judge took of it. There was, in my opinion, evidence to support his findings and I can see no reason for disturbing them.

Finally, considerable importance was attached to the appellant's diary as indicating the physical impossibility of the complainant seeing him when the complainant said he did. This was adequately dealt with by the learned District Judge and after a careful examination of both the diary and the evidence on the subject, I am not prepared to say that his conclusions were unjustified or the result of misdirection.

In the result the appeal must be dismissed and the conviction and sentence affirmed.

Appeal dismissed.

Solicitors: *Marshall & Smith.*

CHARNLEY v. CHARNLEY AND BETTY

[O.. C. J. (Rigby J.) May 4, 1959]

[Penang — Divorce No. 3 of 1957]

Divorce — Husband's adultery in England while wife in Malaya — Jurisdiction — Domicile of parties — Divorce Ordinance, 1952, s.5(1)(c) and (d).

Practice and Procedure — Service of petition of divorce — Respondents in England.

This was a wife's petition for divorce on the ground of her husband's adultery. The petitioner, a Chinese British subject, married the first respondent, also a British subject, in 1947 at Butterworth where he was serving with the R.A.F. Soon after their marriage she followed her husband to England when he was demobilized and obtained civilian employment. In 1952 the petitioner's health was ailing and on her doctor's advice she returned to Malaya on the understanding that it was a temporary parting and she had every intention of returning to her husband. Some months after her arrival in Malaya she wrote to her husband for maintenance, but he replied that he could not afford to send her any money. When she later wrote saying that she wanted to return to England, he replied that he had no money to pay for her return passage. As time passed by letters from her husband ceased, but she continued to receive letters at varying intervals from her father-in-law. These letters progressively demonstrated his increasing disapproval of his own son's conduct and behaviour. In a letter written in 1954 he said that his son was living with Betty the co-respondent, and in January 1955 he wrote that Betty had herself had a baby and referred to the fact that "over 12 months ago" he begged his son "to leave Betty while she had no claim on him . . . ., but he refused", and added "Now she has a claim and I cannot see him leaving her." All these letters were written in affectionate strain. The Court accepted the authenticity and truth of those letters and found adultery proved. On the question of jurisdiction,

Held: (1) before the Court could grant the petition it required to be satisfied that it had jurisdiction to do so. The domicile of a married woman is that of her husband while the marriage subsists, even though the parties may be living apart;

(2) under section 5(1)(c) where a decree of dissolution on the ground of adultery or cruelty is sought it is sufficient if either the marriage was solemnized in the Federation or the adultery was committed in the Federation. It follows that in this case the Court had jurisdiction to entertain the petition.

In considering clause (d) of section 5(1) the Court was satisfied that the petitioner was prevented from taking proceedings in England on account of financial considerations and it was further satisfied that in the interest of justice it was desirable that the suit should be determined in the Federation.

Question of proper service of petition considered.

DIVORCE PETITION.

M. Abraham for the Petitioner.

Respondents did not enter appearance.

Rigby J.: This was a wife's petition for divorce on the ground of her husband's adultery. Since the matter may hereafter require some consideration elsewhere it is perhaps desirable that I should state the grounds on which I considered it proper to grant her a decree.

2. The petitioner was married to the respondent, Desmond Thomas Charnley on the 15th February, 1947, at the Roman Catholic Church at Butterworth, Province Wellesley in the Federation of Malaya. At the time of the marriage the petitioner was aged 19 and the respondent, 21. The petitioner's maiden name prior to her marriage was Shirley Ann Wee. She is of the Chinese race and was born in Butterworth, Province Wellesley, in 1928. At the time of her marriage her husband, a British subject, was serving with the R.A.F. Station at Butterworth. The petitioner is, therefore, a British subject both by birth and by virtue of her husband's nationality. After their marriage the parties lived and cohabited together in Butterworth until they sailed together for England on the 6th March, 1947. Shortly after their arrival in